

DISCLAIMER

This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).

APPLICATION OF

**COMMONWEALTH CHESAPEAKE
CORPORATION**

CASE NO. PUE960224

**For approval of expenditures for new
generation facilities pursuant to Va.
Code § 56-234.3 and for a certificate of
public convenience and necessity
pursuant to Va. Code § 56-265.2**

REPORT OF ALEXANDER F. SKIRPAN, JR., HEARING EXAMINER

July 10, 1998

On September 17, 1996, Commonwealth Chesapeake Corporation, predecessor to Commonwealth Chesapeake Company, L.L.C., (“Commonwealth Chesapeake” or “Company”) filed an application seeking approval and certification of the Company’s proposed construction of a generating facility in Accomack County, Virginia. Specifically, Commonwealth Chesapeake requests: (i) a certificate of public convenience and necessity (“Certificate”) for the facility pursuant to Virginia Code § 56-265.2; (ii) approval under Virginia Code § 56-234.3 for the expenditures for the construction of the generating facility; (iii) exemption from Commission jurisdiction under Chapter 1, Article 5; Chapter 3; Chapter 4; and Chapter 10, Articles 1.1, 2, 2.1, 3 and 4 of Title 56 of the Virginia Code; (iv) clarification that any entity which lends money, credit, or services to the Company is not by virtue thereof a utility or public service company under Virginia law; and (v) a declaration that the granting of a lien or security interest in the Company’s assets does not require Commission approval.

The proposed facility will be an oil-fired electric generating peaking unit located near the town of New Church, Accomack County, on Virginia’s Eastern Shore.¹ The proposed facility will consist of three simple cycle combustion turbines with an aggregate nominal rating of approximately 300 MW. Each unit will include a clutch between the turbine and generator, which will permit the generator to operate as a synchronous condenser, providing voltage support even when the turbine is not in operation.² The proposed facility will operate as an independent power plant, supplying electricity on a wholesale basis to the electricity markets in areas of Virginia, Pennsylvania, New Jersey, Maryland, and Delaware through the Pennsylvania-Jersey-Maryland, or PJM, Interconnection L.L.C. (“PJM”).³

¹ Exhibit RPL-6, at 2, 4.

² *Id.*

³ Exhibit RPL-5, at 2.

By Commission order dated October 24, 1996, the application was set for hearing on January 23, 1997, and a procedural schedule was established. On December 18, 1996, Virginia Electric and Power Company (“Virginia Power”) filed a Motion to Dismiss the Application of Commonwealth Chesapeake. By order dated April 28, 1997, the Commission denied Virginia Power’s Motion to Dismiss and assigned this matter to a Hearing Examiner for further proceedings. Between April 28, 1997, and January 23, 1998, the hearing date and procedural schedule was revised several times to permit revisions and supplementation of the Company’s application. Hearing Examiner’s Ruling dated January 23, 1998, scheduled a local hearing for March 12, 1998, and an evidentiary hearing for April 10, 1998.⁴

The local public hearing was held as scheduled in Arcadia High School, located in Accomack County, Virginia. Twenty-four public witnesses presented comments. Thirteen of the witnesses generally opposed the application and eleven witnesses favored approval of the Company’s application. The Commission also received written comments from several individuals and other entities. These written comments generally were opposed to construction of the proposed facility.

The evidentiary hearing on the application was held in Richmond on April 10, 1998. Counsel appearing were: C. William Waechter, Jr., Esquire, and Robert F. Riley, Esquire, counsel for the Company; and C. Meade Browder, Jr., Esquire, counsel for the Commission’s Staff. Protestant, George Bailey, appeared *pro se*. Four public witnesses offered comment at the April 10 hearing. Two of these witnesses opposed approval of Commonwealth Chesapeake’s application, one supported the Company, and one witness, employed by the Federal Environmental Protection Agency (“EPA”), made herself available to answer environmental questions. Filed with this Report are the transcripts from each of the hearings. Proofs of public notice were marked as Company Exhibits 1 and 2 and admitted into the record. The Staff, the Company, and Mr. Bailey filed briefs on May 26, 27, and 29, 1998, respectively.

SUMMARY OF THE RECORD

On November 12, 1997, Commonwealth Chesapeake filed a revised application dated October 23, 1997. Accompanying the Company’s revised application were the Information Required for Approval of Independent Power Facilities⁵ and the supporting testimony of R. Peter Lalor and William C. Daley. The testimony of Mr. Lalor addresses: (i) the history of the proposed facility, (ii) environmental permitting, (iii) issues related to site and land use, (iv) the need for the power to be produced by the facility, and (iv) other benefits to the public related to the proposed facility.⁶ Mr. Daley’s testimony outlined the Company’s preliminary plans for engineering, procurement, and construction of the facility. However, Mr. Daley’s testimony filed

⁴ Hearings also were convened in Richmond on January 23, 1997, November 19, 1997, and January 8, 1998, solely for receiving comments from public witnesses. No public witness appeared during these hearings.

⁵ See, *Ex Parte*, in re: *Investigation into the Promulgation of Filing Requirements for Independent Power Producers*, Case No. PUE900044, 1990 S.C.C. Ann. Rep. 357.

⁶ Exhibit RPL-23.

on February 20, 1998, replaced his testimony filed on November 12, 1997. Mr. Daley's testimony filed on November 12, 1997 was not made part of the record.

On February 20, 1998, the Company further supplemented its application by filing the direct testimonies of Paul W. Burdick,⁷ Michael W. Kelly,⁸ and William C. Daley,⁹ and the supplemental testimony of R. Peter Lalor.¹⁰ Mr. Burdick's testimony addresses AES Chesapeake Inc.'s acquisition of a 50% interest in the project. AES Chesapeake Inc. is a wholly owned subsidiary of AES Corporation, which owns or has an interest in eighty-two generating plants totaling 21,859 MW in twelve countries.¹¹ Mr. Kelly, an engineer with Black and Veatch, presents the results of thirteen load flow studies to support the need for additional generating capacity in the southern portion of the Delmarva Power system. Mr. Daley's testimony describes the Company's preliminary plans for engineering, procurement, and construction of Commonwealth Chesapeake's proposed facility. Finally, Mr. Lalor's supplemental testimony addresses AES Chesapeake Inc.'s participation in the proposed facility, and provides additional information concerning the proposed facility, the development of a competitive electric market, and earlier Commission precedent. Interestingly, Mr. Lalor reiterated that Commonwealth Chesapeake sought a conditional Certificate, subject to the Company obtaining commitments from purchasers for the facility's output.¹²

On March 12, 1998, twenty-four public witnesses provided testimony at the local public hearing in Accomack County. The following chart contains a brief synopsis of each witness's comments.

NAME	ADDRESS	POINTS RAISED
Steve Graham ¹³	Bloxom, VA	<i>Opposed</i> – Power is for New Jersey; facility does not benefit Virginia.
Judy A. Williamson ¹⁴	Stockton, MD (owns a business in Chincoteague, VA)	<i>Opposed</i> – Emissions will contribute to nutrient overloads of bay and local rivers. The facility is six miles from the pfiesteria-plagued Pocomoke River. The facility could reduce emissions by using other technology.
Curt Lippoldt ¹⁵	Pocomoke City, MD (Mayor)	<i>Opposed</i> – NOx emissions may negate \$2.4 million spent to remove nitrogen and phosphorus from the Pocomoke River to combat pfiesteria.

⁷ Exhibit PWB-49.

⁸ Exhibit MWK-3.

⁹ Exhibit WCD-4.

¹⁰ Exhibit RPL-24.

¹¹ Exhibit PWB-49, at 2-3.

¹² Exhibit RPL-24, at 31-32.

¹³ Graham, Tr. at 10-13.

¹⁴ Williamson, Tr. at 13-20.

¹⁵ Lippoldt, Tr. at 21-25.

NAME	ADDRESS	POINTS RAISED
Frank Bardinelli ¹⁶	Hallwood, VA	<i>Opposed</i> – Facility is too big to be a peaker. If NJ and PA need power, build it there.
Elizabeth Trader ¹⁷	New Church, VA	<i>Opposed</i> – Concerned about water use, destruction of farmland, emissions and predicted visibility problems for Assateague Island by the National Park Service.
Thomas Dickinson ¹⁸	Salisbury, MD (energy manager, Perdue Farms)	<i>Supports</i> – Asks the Commission to consider three factors: deregulation of electric generation, the nature of transmission and distribution on the Eastern Shore, and the incremental environmental impact of the proposed facility.
George Bailey ¹⁹ (a Protestant)	Greenbackville, VA	<i>Opposed</i> – No need for new power. Delmarva cannot prove the need for another facility.
Todd Matthews ²⁰	Pocomoke City, MD	<i>Opposed</i> – Facility is not in the local public interest, there is no need for the power, and will provide little local economic benefit.
Edward McFord ²¹	New Church, VA	<i>Supports</i> – Chicken growers can lose their chickens if it is hot and they lose power. Area had an 8-hour outage last year, but it was cool.
William McFord ²²	New Church, VA	<i>Supports</i> – Works with air conditioners and has seen the problems caused by voltage fluctuations. Facility will pollute less than replaced plants. Good location for facility.
Willie Holland, Jr. ²³	Parksley, VA (member - Accomack Industrial Development Authority and Bi-county Economic Development Commission)	<i>Supports</i> – The Authority does not approve industrial projects that pollute and use large quantities of water. The facility is no threat to the environment and does not use enough water to need a permit. Facility adds \$80 million to the local tax base.
Tom Burton ²⁴	New Church, VA	<i>Supports</i> – The pollution problems of the Eastern Shore come from other places.

¹⁶ Bardinelli, Tr. at 25-27.

¹⁷ Trader, Tr. at 27-31.

¹⁸ Dickinson, Tr. at 31-36.

¹⁹ Bailey, Tr. at 36-42.

²⁰ T. L. Matthews, Tr. at 42-48.

²¹ E. McFord, Tr. at 49-53.

²² W. McFord, Tr. at 53-56.

²³ Holland, Tr. at 56-66.

²⁴ Burton, Tr. at 66-71.

NAME	ADDRESS	POINTS RAISED
Greg Manter ²⁵	Onancock, VA (Director of Economic Development Commission)	<i>Supports</i> – (1) endorsed by the Accomack County Board of Supervisors, (2) increases tax revenues, (3) new jobs, (4) improves the quality of electricity, (5) increases competition and lowers rates, and (6) increases reliability.
Doug Bonney ²⁶	Onancock, VA	<i>Opposes</i> – Facility may have an adverse effect on water supply, local environment, and tourism.
Gunnar Sarsten ²⁷	Belle Haven, VA	<i>Supports</i> – Project developers have held public meetings to explain the project. Believes that the environmental impact will be minimal.
Dr. Marilyn Ailes ²⁸	Chincoteague, VA (Ph.D. in Environmental Science)	<i>Opposes</i> – Facility will store 10.6 million gallons of fuel oil over the recharge zone for the sole-source aquifer. It could take years to clean up a spill. Other states want VA to stop polluting.
Carolyn Walker ²⁹	Pocomoke City, MD	<i>Opposes</i> – Concerned about water quality and quantity, and about effect of emissions on crops.
John Aswell ³⁰	Chrisfield, MD (volunteer fireman)	<i>Supports</i> – During power outages, power from the facility can be used to fight fires in the vicinity of the facility. Demand is growing.
Thomas Matthews ³¹	Wattsville, VA (Accomack County Board of Supervisors)	<i>Opposes</i> – Opposition by the Chesapeake Bay Foundation raises several concerns and the need for further study of environmental issues including pfiesteria and the poultry industry.
Jack Bonniwell ³²	Accomac, VA	<i>Supports</i> – Impressed with the Company's facility in Chesapeake, VA. Facility's benefits far exceed perceived environmental impact.
John Bloxom ³³	Pocomoke City, MD	<i>Opposes</i> – Concerned that the Chesapeake Bay Foundation opposes. Should permit deregulated markets to develop before considering the Company's proposed facility.
NAME	ADDRESS	POINTS RAISED

²⁵ Manter, Tr. at 71-74.

²⁶ Bonney, Tr. at 74-77.

²⁷ Sarsten, Tr. at 77-80.

²⁸ Ailes, Tr. at 80-84.

²⁹ Walker, Tr. at 84-86.

³⁰ Aswell, Tr. at 86-91.

³¹ Thomas Matthews, Tr. at 91-94.

³² Bonniwell, Tr. at 95-97.

³³ Bloxom, Tr. at 97-100.

John Price ³⁴	Exmore, VA	<i>Supports</i> – Opposed environmentally dangerous projects in the past, but supports the proposed facility based on the facts.
Donald Hart ³⁵	Keller, VA (Accomack County Board of Supervisors)	<i>Supports</i> – The proposed facility has broad public support. Supervisors voted 7-2 in favor. Power has been a problem. The County is the first out and last on. The aquifer of the peninsula has four layers. A fuel spill will not effect the lower three layers.
Linwood Windsor ³⁶	Onancock, VA	<i>Opposes</i> – Questions the technology planned for the proposed facility.

In direct testimony filed on March 13, 1998, the Staff recommended that Commonwealth Chesapeake's request for a contingent Certificate be granted.³⁷ The Staff further recommended that the Company's Certificate be contingent upon obtaining a power contract for at least 100 MW of the facility's output and that the Company be given three years to place the proposed facility in service.³⁸ The Staff's recommendations were presented and supported in the direct testimonies of Catharine M. Lacy,³⁹ John R. Ballsrud,⁴⁰ and David R. Eichenlaub.⁴¹ The testimony of Ms. Lacy addresses Certificate-related issues, including a review of the status of environmental permits. Mr. Ballsrud comments on the financial viability of the Company's proposed facility. Mr. Eichenlaub's testimony examines the load forecast and supply requirements on Virginia's Eastern Shore.

On March 26, 1998, Commonwealth Chesapeake filed the rebuttal testimonies of Paul W. Burdick⁴² and R. Peter Lalor.⁴³ In light of the enactment of the amendment to Virginia Code § 56-265.2, effective March 13, 1998, on rebuttal the Company changed its request for a conditional Certificate to a *non*-conditional Certificate. Specifically, Mr. Burdick takes issue with Staff's assertion that Commonwealth Chesapeake's permanent financing is predicated on obtaining a power marketing agreement for the facility's capacity.⁴⁴ Mr. Burdick's rebuttal testimony also questions the necessity of the Company obtaining a power contract for at least 100 MW of the facility's output.⁴⁵ Mr. Lalor's rebuttal testimony provides support for a non-

³⁴ Price, Tr. at 100-02.

³⁵ Hart, Tr. at 102-12.

³⁶ Windsor, Tr. at 112-13.

³⁷ Exhibit CML-51, at 6.

³⁸ *Id.*; Exhibit DRE-53, at 11.

³⁹ Exhibit CML-51.

⁴⁰ Exhibit JRB-52.

⁴¹ Exhibit DRE-53.

⁴² Exhibit PWB-50.

⁴³ Exhibit RPL-42.

⁴⁴ Exhibit PWB-50, at 2-5.

⁴⁵ *Id.* at 2, 5-6.

conditional Certificate and responds to several of the issues raised during the local public hearing held on March 12, 1998.

Differences between Commonwealth Chesapeake and the Staff narrowed during the course of the evidentiary hearing held April 10, 1998. The Company agreed to the requirement that it complete construction and place the proposed facility in service within three years.⁴⁶ The Staff, on the other hand, agreed that Commonwealth Chesapeake's Certificate should not be subject to the condition of obtaining a power purchase contract.⁴⁷ Consequently, by the conclusion of the evidentiary hearing, both the Company and the Staff recommend that the Commission grant a Certificate to Commonwealth Chesapeake subject to the condition that the proposed facility be in service within three years.

However, Protestant, George Bailey, and two public witnesses, Judy Williamson and Elizabeth Trader, continued to oppose construction of the proposed facility. Mr. Bailey, a concerned citizen who has lived on the Eastern Shore for more than thirty years, makes four arguments in opposition to the proposed facility. First, Mr. Bailey examines various load and capacity forecasts and concludes that these forecasts fail to support the need for new generation.⁴⁸ Second, Mr. Bailey questions assessments of the environmental impact of the proposed facility, especially NOx emissions and water use.⁴⁹ Third, Mr. Bailey argues that high-temperature selective catalytic reduction ("SCR") technology represents the best available technology for the proposed facility.⁵⁰ Finally, Mr. Bailey contends that the Company's proposed facility will not enhance the reliability of electric service on the Eastern Shore of Virginia.⁵¹ The themes of Mr. Bailey's arguments against the Company's proposed facility are similar to those raised by many of the public witnesses, including Ms. Williamson and Ms. Trader. The participation of Mr. Bailey and the public witnesses has been helpful in developing a complete record in this case.

DISCUSSION

Essentially, this case presents the Commission with two issues. First, should the Commission grant a Certificate to Commonwealth Chesapeake for its proposed facility? Second, if the Commission grants a Certificate, should it also grant waivers from certain other regulatory requirements? Each of these issues is discussed separately below.

Issuance of Certificate

As provided in Virginia Code § 56-265.2 A, it is "unlawful for any public utility to construct . . . any facilities for use in public utility service . . . without first having obtained a certificate from the Commission" As used in § 56-265.2, *public utility* is broadly defined to

⁴⁶ Lalor, Tr. at 190-92.

⁴⁷ Eichenlaub, Tr. at 263-64.

⁴⁸ Exhibit GB-54; Bailey, Tr. at 270-74.

⁴⁹ *Id.* at 274-80.

⁵⁰ *Id.* at 278-80.

⁵¹ *Id.* at 280-84.

mean “any company which owns or operates facilities within the Commonwealth of Virginia for the generation . . . of electric energy for sale.”⁵² Furthermore, Virginia Code § 56-234.3 requires electric utilities that intend to construct a new generating facility in excess of 100 MW to obtain Commission approval prior to construction. Here again, *public utilities* is defined broadly to include every company “that now or hereafter may own, manage or control any plant or equipment . . . within the Commonwealth . . . for the production . . . of . . . power . . . , either directly or indirectly, to or for the public.”⁵³ Thus, independent power producers (“IPPs”), such as Commonwealth Chesapeake, which generate power to sell at wholesale, have been subject to the requirements of §§ 56-234.3 and 56-265.2. Indeed, the Company’s application in this case seeks approval for its proposed facility pursuant to Virginia Code § 56-234.3 and a Certificate pursuant to Virginia Code § 56-265.2.

In previous Certificate cases for IPPs, the Commission interpreted these statutes to require an explicit showing of need for the proposed new facility. For example, the Commission granted a Certificate to Doswell Limited Partnership based upon a showing of need for the project and a showing of the technical and financial viability of the developer and its project.⁵⁴ On the other hand, the Commission declined to issue a Certificate to Patowmack Power Partners, L.P. because it was unable to find a need for the power to be produced by the plant.

The Commission is empowered by the Code of Virginia to issue the requested certificate only if it finds that the “*public convenience and necessity require*” its issuance. The Commission is unable to find that the public convenience and necessity require the construction of this plant Virginia Power has no present need for the capacity of the plant. No other prospective purchaser has contracted for its output. The Commission cannot find that the power to be produced by the plant is presently needed.⁵⁵

In addition to determining the need for proposed new capacity in Certificate cases, Virginia Code § 56-46.1 requires the Commission to “give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact.” As applied by the Commission in *Patowmack*, § 56-46.1 required “the balancing of the public’s need for the facility against the environmental impact caused by the facility.”⁵⁶ Consequently, if the Commission was unable to find a need for the

⁵² Virginia Code § 56-265.1(b).

⁵³ *Id.* § 56-232.

⁵⁴ *Application of Doswell Limited Partnership, For a certificate of public convenience and necessity and, if applicable, for approval of expenditures for new generating facilities*, Case No. PUE890068, 1990 S.C.C. Ann. Rep. 297 (“*Doswell*”).

⁵⁵ *Application of Patowmack Power Partners, L.P., For approval of expenditures for generation facilities pursuant to Va. Code § 56-234.3 and for a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2*, Case No. PUE910081, 1995 S.C.C. Ann. Rep. 268, 270 (“*Patowmack*”) (emphasis in the original).

⁵⁶ *Id.* at 270.

power from a proposed facility, any showing of negative environmental impact could tip the balance against the project.

Since *Patowmack*, the General Assembly has amended both Virginia Code § 56-46.1 and Virginia Code § 56-265.2. In 1996, the General Assembly added the following sentence to Virginia Code § 56-46.1 A:

Additionally, the Commission (i) may consider the effect of the proposed facility on economic development within the Commonwealth and (ii) shall consider any improvements in service reliability that may result from the construction of such facility.

Therefore, the General Assembly has expanded the Commission's analysis regarding approval of the construction of proposed electric facilities. The Commission's analysis *may* now include consideration of the effect of the proposed facility on economic development within the Commonwealth and *must* include consideration of improvements in service reliability. Accordingly, the Commission's analyses under § 56-46.1 should not be driven solely by a showing of need for the power to be produced by the proposed facility.

On March 13, 1998, new subsection B was added to § 56-265.2. This new provision permits the Commission to issue a Certificate for "the construction and operation of electrical generating facilities, which shall not be included in the rate base of any regulated utility whose rates are established pursuant to Chapter 10 of Title 56," upon a finding that its proposed facilities:

- (i) will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth;
- (ii) will have no material adverse effect upon reliability of electric service provided by any such regulated public utility;
and
- (iii) are not otherwise contrary to the public interest.

In addition, § 56-265.2 B directs:

In review of its petition for a certificate to construct and operate a generating facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities . . . on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1.

Finally, § 56-265.2 B permits:

Facilities authorized by a certificate issued pursuant to this subsection may be exempted by the Commission from the provisions of Chapter 10 of Title 56.

This final provision eliminates mandatory application of the requirements of § 56-234.3 that is contained in Chapter 10 of Title 56 of the Virginia Code.

New § 56-265.2 B relaxes the standard for the issuance of a Certificate. Under § 56-265.2 A the Commission could issue a certificate only upon a finding that the “public convenience and necessity require” its issuance. Similarly, § 56-234.3 requires the Commission to “determine whether the proposed improvements are necessary” before approving expenditures by a requesting utility. In contrast, § 56-265.2 B permits the issuance of a certificate upon a finding that the facility will have no material adverse effect upon rates and the reliability of service, and is not otherwise contrary to the public interest. Thus, § 56-265.2 B does not require that an IPP prove an explicit need for a proposed facility, though the need for the power generated by a proposed facility continues to be relevant to inquiries into *public interest*.

Accordingly, the analysis to determine whether Commonwealth Chesapeake is entitled to a Certificate for its proposed facility must begin with a determination of the applicability of Virginia Code § 56-265.2 B. If § 56-265.2 B governs, then analysis of the Company’s request must find that the proposed facility: (i) will have no material adverse effect upon retail rates; (ii) will have no material adverse effect upon the reliability of electric service; and (iii) is not contrary to the public interest. Finally, the environmental impact of the proposed facility must be considered as provided by §§ 56-46.1 and 56-265.2 B. In this regard, considerations of the impact of the proposed facility on the environment and economic development, and determinations of the need for additional generation will be made in the context of determining whether the proposed facility is contrary to the public interest. Discussions of each of these issues are provided separately below.

Application of § 56-265.2 B

As stated above, § 56-265.2 B governs the certification of electrical generating facilities, “which shall not be included in the rate base of any regulated utility whose rates are established pursuant to Chapter 10 of Title 56.”⁵⁷ Commonwealth Chesapeake will sell electricity for resale and will be subject to Federal Energy Regulatory Commission (“FERC”) jurisdiction concerning rates.⁵⁸ Because the Company is not subject to Commission ratemaking authority, Commonwealth Chesapeake’s rates are not established pursuant to Chapter 10 of Title 56 of the Virginia Code. Furthermore, no regulated utility, whose rates are established under Chapter 10 of Title 56, has any financial or ownership interest in the Company.⁵⁹ Consequently, no portion of the cost of the Company’s proposed facility will be included in the rate base of any regulated

⁵⁷ Virginia Code § 56-265.2 B.

⁵⁸ Exhibit RPL-5, at 3.

⁵⁹ Exhibit PWB-49, at 2; JRB-52, at Chart 1.

utility whose rates are established pursuant to Chapter 10 of Title 56 of the Virginia Code. Therefore, Virginia Code § 56-265.2 B governs the certification of Commonwealth Chesapeake's proposed facilities.

Impact on Retail Rates

As outlined above, before issuing a Certificate under Virginia Code § 56-265.2 B, the Commission must make three specific findings. The first finding is that the proposed facility "will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth." In this regard, the Company asserts that it will sell the facility's capacity and energy to PJM. PJM will dispatch the facility only when it is the lowest cost generator of electricity available or when there is some emergency within the area near the plant.⁶⁰ Because PJM will dispatch the proposed facility only when it is the lowest cost generation resource available, Commonwealth Chesapeake argues that the proposed facility can have only a positive effect on rates paid by the customers of regulated utilities within the Commonwealth.

In evaluating the impact of the proposed facility on the rates of retail customers, the Staff posed interrogatories to Delmarva. Early in this case, Delmarva filed as a Protestant, but did not participate actively in the proceeding. In a response to a Staff interrogatory, Delmarva stated that Commonwealth Chesapeake's proposed facility could increase zonal transmission rates if required transmission improvements are not borne by Commonwealth Chesapeake.⁶¹ Delmarva declined to estimate the cost of these improvements or their potential impact on rates.⁶² Staff witness Lacy testified that typically, the IPP or entity that causes the need for a transmission upgrade usually pays for the required upgrade.⁶³ Even if Delmarva funds the transmission upgrade, Delmarva indicates that these costs will be borne by all of its transmission customers and not just its Virginia jurisdictional customers.⁶⁴ Thus, the Staff did not find that the Company's proposed facility will have a material adverse impact on retail rates within the Commonwealth.

No party or person offering comments suggests that Commonwealth Chesapeake's proposed facility will have a material adverse impact on retail rates within the Commonwealth. The only question raised relates to the payment for upgrades to Delmarva's transmission facilities. Issuing a Certificate conditioned upon Commonwealth Chesapeake paying for all required upgrades to Delmarva's transmission system could alleviate such a concern. Nonetheless, requiring Commonwealth Chesapeake to fund upgrades to Delmarva's transmission system is unnecessary in this case. As discussed below, Commonwealth Chesapeake must negotiate and enter a transmission interconnection agreement with Delmarva in order to sell electricity to PJM. Such an agreement should address any required upgrades to Delmarva's transmission system and who will pay for these required upgrades. Leaving these issues to future interconnection

⁶⁰ Daley, Tr. at 178; Company Brief at 9-10.

⁶¹ Exhibit CML-51, at Exhibit No. 2, page 2.

⁶² *Id.*

⁶³ Lacy, Tr. at 242.

⁶⁴ Exhibit CML-51, at Exhibit No. 2, page 2.

negotiations provides the parties with greater flexibility to fashion a mutually beneficial agreement.

Accordingly, based on the Company's testimony regarding the economic dispatch of the facility and Delmarva's failure to quantify the cost or impact of required upgrades to its transmission facilities, the record in this case supports a finding that the proposed facility will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth.

Impact on reliability of service

Section 56-265.2 B also requires that the proposed facility "will have no material adverse effect upon reliability of electrical service provided by any such regulated public utility." Commonwealth Chesapeake maintains that its proposed facility will improve the reliability of electric service for retail customers on the Eastern Shore.⁶⁵ The Company also argues that the record contains no evidence to suggest that its facility will have *any* adverse impact upon the reliability of electric service provided by any public utility.⁶⁶ Staff's investigation supports the Company's claim. For example, the Staff asked Delmarva in an interrogatory whether Commonwealth Chesapeake's proposed facility might have any negative impact on the reliability of electric service provided by Delmarva. Delmarva's response was that the proposed facility "probably will not have any adverse impact on the reliability of electric service provided by Delmarva."⁶⁷

There is no evidence in the record to suggest that the Company's proposed facility will have an adverse impact upon the reliability of service. Absent such evidence, the record can only support a finding that Commonwealth Chesapeake's proposed facility will have no material adverse effect upon the reliability of electrical service provided by any regulated public utility within the Commonwealth.

The Public Interest

The third finding required by Virginia Code § 56-265.2 B is that the proposed facility is "not otherwise contrary to the public interest."

Though not tied directly to any specific finding, § 56-265.2 B directs the Commission to consider "the effect of the facility and associated facilities, including transmission lines and equipment, on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1." Section 56-46.1 also directs that whenever the Commission is required to approve the construction of an electric facility that it give consideration to the effect of the facility on the environment and establish conditions as required to minimize adverse environmental impact. Furthermore, § 56-46.1 permits the

⁶⁵ Company Brief at 10.

⁶⁶ *Id.*

⁶⁷ Exhibit CML-51, at Exhibit No. 2, page 1.

Commission to consider the effect of the proposed facility on economic development within the Commonwealth and requires the Commission to consider any improvements in reliability that may result from construction of the proposed facility. Each of these considerations is a facet of the public interest. For example, the construction of a facility found to harm the environment substantially is likely to be contrary to the public interest. Nonetheless, a final assessment of whether such a project is contrary to the public interest would necessitate a weighing of other traditional factors, such as need and the viability of the project, and the other statutory factors related to economic development and service reliability. Therefore, the analysis to determine whether Commonwealth Chesapeake's proposed facility is contrary to the public interest at a minimum should include a balancing or weighing of: (i) the environmental impact of the proposed facility; (ii) the need for the facility; (iii) the technical and financial viability of the developer and the project; (iv) the effect of the facility on economic development within the Commonwealth; and (v) any improvements in service reliability that may result from the construction of the proposed facility.

1. Environmental Impact.

Commonwealth Chesapeake claims that it has already received all of the necessary environmental permits and that the impact of the proposed facility on the environment is insignificant.⁶⁸ Indeed, the Company argues that operation of the proposed facility will likely result in a net reduction in air pollution.⁶⁹ Protestant Bailey and a number of public witnesses in opposition to the Company's proposed facility attempt to portray the facility as an environmental hazard. The Staff independently confirmed with the Virginia Department of Environmental Quality ("DEQ") that the various state and local agencies responsible for issuing the necessary environmental permits found "no significant problems with the proposed generating facility project."⁷⁰ The Staff also reported that the DEQ issued the Company a Prevention of Significant

⁶⁸ Exhibit RPL-23, at 4; Exhibit RPL-42, at 3.

⁶⁹ Company Brief at 21-22; Exhibit RPL-42, at 8-9.

⁷⁰ Staff Brief at 7-8; Exhibit CLM-51, at Appendix A-1.

Deterioration (“PSD”) air permit, effective May 19, 1997.⁷¹ However, although the Staff supports granting a Certificate to the Commonwealth Chesapeake, the Staff also stated that the proposed facility “will obviously emit NOx Therefore, should the Commission determine there is not a significant public benefit to be gained . . . environmental concerns could serve to tip the balance in favor of rejecting the application.”⁷²

The DEQ limits emissions from Commonwealth Chesapeake’s proposed facility as follows:⁷³

Item	LB/HR at Base Load	LB/HR at Peak Load	Tons/Year
Total Suspended Particulate	32.1	32.5	96.3
PM-10	32.1	32.5	96.3
Sulfur Dioxide	86.0	86.0	258.0
Nox	400.0	473.9	1,218.3
Carbon Monoxide	32.0	32.0	96.0
Volatile Organic Compounds	13.0	13.0	38.9
Lead	0.02	0.02	0.05
Beryllium	0.004	0.004	0.01
Formaldehyde	0.4	0.4	1.2
Mercury	0.004	0.004	0.01
Nickel	1.8	1.8	5.3
Sulfuric Acid Mist	12.2	12.2	36.5

DEQ originally issued Commonwealth Chesapeake a PSD air permit on May 21, 1996. Four citizens, including Elizabeth Trader, who appeared as a public witness in this proceeding, and Dorothy Bonney, who submitted written comments to the Staff, appealed DEQ’s findings to the EPA. Specifically, the EPA was asked to determine: (i) whether air emissions from the facility and other effects of the plant operation will harm human health and the ecosystem in the surrounding communities; (ii) if DEQ erred in not requiring SCR as the best available control technology (“BACT”) for the plant; (iii) whether the plant will contribute to acid rain; and (iv) whether the plant will have other negative impacts unrelated to air quality, such as depletion of groundwater resources, conversion of agricultural land, and excessive noise.⁷⁴ Because DEQ administers the federal PSD program in Virginia pursuant to a delegation of authority from the EPA, petitioners challenging the DEQ before the EPA must show that the DEQ clearly erred.⁷⁵

⁷¹ *Id.*; Lalor, Tr. at 200. Paragraph Number 28 of the air permit issued by DEQ provides:

This permit shall become invalid if the construction of the combustion turbine electric generation facility is not commenced within 18 months of the date of this permit or if it is discontinued for a period of 18 months. Exhibit RPL-9, at 10.

⁷² Staff Brief at 8-9.

⁷³ Exhibit RPL-44, at 7.

⁷⁴ Exhibit RPL-45, at 1.

⁷⁵ *Id.* at 3, 8-9.

In this case, the EPA upheld the award of a PSD air permit to Commonwealth Chesapeake.⁷⁶ Nonetheless, opponents of the Company's proposed project continue to press many of these same issues before this Commission.

For example, Mr. Bailey continues to argue that SCR is the BACT for the plant and that utilization of such technology could cut NOx emissions by approximately 80% or by about 975 tons per year.⁷⁷ DEQ agreed with the Company and rejected use of SCR technology as not cost-effective since the incremental cost of installing SCR technology is over \$8,500 per ton of additional NOx removed.⁷⁸ Moreover, during the evidentiary hearing, Company witness Lalor provided a discussion of other environmentally related drawbacks to using SCR technology:

One of the disadvantages of using SCR, as it's called, is that a necessary ingredient to that is ammonia. Ammonia itself is a pollutant and a toxic material, I believe, and is not something that you would like to park on the Chesapeake Bay watershed.⁷⁹

Sections 56-46.1 and 56-265.2 B require that the Commission "establish such conditions as may be desirable or necessary to minimize adverse environmental impact." However, § 56-46.1 directs the Commission to "receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection" Opponents to the facility failed to offer any evidence or any arguments that differed from those already considered by either DEQ or the EPA. Based on the record in this case, there is no need to re-litigate air emissions issues fully addressed by the DEQ and upon appeal, by the EPA in the issuance of a PSD air permit. DEQ and EPA thoroughly examined those issues, which fall within the responsibility and expertise of these agencies.

Furthermore, with the exception of requiring Commonwealth Chesapeake to perform as promised, the record fails to indicate that the Commission should establish any conditions to minimize the adverse environmental impact of the proposed facility. The only condition suggested by opponents to the facility relates to using SCR technology. However, both DEQ and EPA rejected SCR technology as not cost-effective for the Company's proposed facility. The record contains no evidence that the analysis undertaken by either the DEQ or the EPA was flawed or based on incorrect data. Therefore, because the DEQ and the EPA rejected the use of SCR technology, the record does not support imposing SCR technology as a condition by this Commission.

Nonetheless, the record supports requiring Commonwealth Chesapeake to perform as either promised or as anticipated. For example, in the information submitted by the Company in support of its application the Company stated that "[u]p to 100 acres of surrounding woodland

⁷⁶ *Id.* at 1-2.

⁷⁷ Exhibit GB-54, at Attached REF H.

⁷⁸ Exhibit RPL-45, at 18-22.

⁷⁹ Lalor, Tr. at 222.

will be purchased to provide a visual buffer.”⁸⁰ Thus, out of the approximately 135 acres to be purchased for the proposed facility, 100 acres would serve as a buffer. But, the purchase option for the plant site submitted with the application was for only thirty-five acres and failed to show the 100-acre buffer.⁸¹ During the evidentiary hearing, Company witness Lalor explained that the purchase option submitted with the application later was amended to include the additional 100-acre buffer. When asked to confirm that Commonwealth Chesapeake would purchase the 100-acre buffer, Mr. Lalor responded:

Yes. Our option is up to a hundred acres, and our intention is to purchase as much of that as necessary to assure a visual buffer.⁸²

In other testimony concerning the choice of the proposed site, Mr. Lalor stressed the size of the proposed site and that the plant would not be visible to other structures.

The site is located on a total of about a hundred and 35 acres at the northern end of Accomack County The site itself is surrounded by trees. The plant, after construction, will not be visible from the Town of New Church or any other residential or commercial structures. So we felt that the plant was unobtrusive and was well located in that respect. It’s far away from existing structures and residences, and it is located at a place where fuel can be delivered without disrupting the communities by truck deliveries, and power can be shipped out because it is located . . . on a major transmission line, . . . and it is also located close to an existing substation.⁸³

It is unclear from the Company’s application and testimony whether the proposed facility will have a 100-acre buffer. Several public witnesses expressed concern regarding the visual impact and noise of the proposed facility on the immediately surrounding area.⁸⁴ A 100-acre buffer should minimize any adverse environmental impact the proposed facility may have on the immediately surrounding area. Moreover, the site for the proposed facility was chosen, in part, because it was unobtrusive to the surrounding area. Therefore, the record supports a requirement that Commonwealth Chesapeake, pursuant to §§ 56-46.1 and 56-265.2 B, purchase and maintain a 100-acre buffer as a condition for its Certificate.

Staff provides the most accurate appraisal of assessing the overall environmental impact of the Company’s proposed facility and its effect on the determination of the public interest. Commonwealth Chesapeake’s proposed facility likely will negatively affect the environment. It is

⁸⁰ Exhibit RPL-6, at 4.

⁸¹ Exhibit RPL-21; Lalor, Tr. at 197.

⁸² Lalor, Tr. at 198.

⁸³ *Id.* at 194-95.

⁸⁴ *See, e.g.*, Bardinelli, Tr. at 26; Walker, Tr. at 85; Thomas Matthews, Tr. at 94; Trader, Tr. at 156-58.

undisputed that NOx emissions from the facility will be over 1,200 tons per year. It is difficult to conceive of 1,200 tons of anything being “insignificant” as argued by the Company. For construction of the proposed facility to be in the public interest, other benefits must outweigh the negative environmental impact of the facility.

Furthermore, Commonwealth Chesapeake’s contention that its proposed facility will lead to a reduction in the overall level of pollution entering the Chesapeake Bay is unconvincing. The Company argues that while the proposed facility is operating, other generating resources with higher emission levels will be displaced, thus lowering the overall level of emissions.⁸⁵ But, as Mr. Bailey counters, Commonwealth Chesapeake’s premise is not necessarily true for three reasons. First, if demand increases, as predicted by the Company, then PJM may continue to operate plants with higher emission levels in addition to dispatching Commonwealth Chesapeake’s proposed facility.⁸⁶ Second, not all PJM plants have emission levels higher than the Company’s proposed facility.⁸⁷ Thus, the net impact of the Company’s proposed facility on emissions will depend upon which generating units it actually replaces. Third, even if overall emissions decrease, operation of the proposed facility could produce a higher concentration of emissions in the local area adjacent to the plant.⁸⁸ Therefore, in evaluating the public interest, the record in this case best supports a finding that the Company’s proposed facility has an overall negative impact on the environment.

2. Need.

In support of its Certificate application, Commonwealth Chesapeake presented evidence that PJM, Old Dominion Electric Cooperative (“ODEC”), and Delmarva will require additional capacity over the next three to five years.⁸⁹ Staff witness Eichenlaub independently confirmed that ODEC and Delmarva will likely need additional capacity within the next few years to meet projected demands.⁹⁰ Mr. Eichenlaub also reviewed a recent (February 1998) PJM forecast that indicated a need for additional generation capacity to supply the load requirements of the region within the next five years.⁹¹ Before the hearing, the Staff recommended that the Commission grant Commonwealth Chesapeake a conditional Certificate, contingent upon the Company obtaining a power contract of at least 100 MW.⁹² During the evidentiary hearing, the Staff dropped this recommendation. Finally, Protestant Bailey testified that load forecasts for PJM state that scheduled generation and capacity purchases versus expected peak demand indicate adequate reserves for the ten-year period (1996-2005).⁹³ He, therefore, argues that Commonwealth Chesapeake has failed to prove a need for the proposed facility.

⁸⁵ Company Brief at 21.

⁸⁶ Bailey, Tr. at 275; Company Brief at 13-14.

⁸⁷ Bailey, Tr. at 275.

⁸⁸ *Id.*

⁸⁹ Company Brief at 13.

⁹⁰ Exhibit DRE-53, at 4.

⁹¹ *Id.* at 9.

⁹² *Id.* at 11.

⁹³ Bailey, Tr. at 271-72; Staff Exhibit 56, at Introduction.

This is the first case decided under Virginia Code § 56-265.2 B, which changes the standard for the issuance of a Certificate from a showing that the public convenience and necessity require the construction of a new facility, to a showing that construction of the proposed new facility is not contrary to the public interest. Thus, although in the past it was essential for an applicant to demonstrate a need for a new facility, pursuant to § 56-265.2 B a showing of need now becomes one of the factors to be weighed in determining the public interest.

Taken as a whole, the various forecasts for PJM, ODEC, and Delmarva indicate that these systems will need additional generating resources within the next three to five years. The apparent discrepancies in the forecasts that Mr. Bailey identified generally relate to whether the forecasts consider either existing generating units only, or also include planned new generating units.⁹⁴ The forecasts fail to demonstrate a lack of need. On the contrary, Mr. Bailey highlights the Staff's caveat that while forecasts for PJM, ODEC, and Delmarva indicate that these systems will need additional generating resources, Commonwealth Chesapeake's proposed facility may not be the most effective means of satisfying this need.⁹⁵

The development of a competitive wholesale market on the Eastern Shore also changes the assessment of need traditionally undertaken in IPP Certificate cases. PJM is the independent system operator ("ISO") that will dispatch all generating resources of its members to provide power to the PJM region, which includes the Eastern Shore.⁹⁶ More specifically, as described by Company witness Lalor during the hearing, PJM will act as a clearinghouse for energy transactions.⁹⁷ A retail electric company such as Delmarva will continue to have the option of running its own units or purchasing from lower cost units as dispatched by PJM.⁹⁸ If the retail electric company chooses to purchase its own, more costly generation, PJM will penalize that company in an amount equal to the excess of their costs, and then credit that amount to the owner of the lower cost generation.⁹⁹ On the other hand, the Company's facility will be dispatched only when it is the least cost alternative. Accordingly, the competitive wholesale market as it has developed on the Eastern Shore should provide adequate incentives for efficient generation, transmission, and distribution of electric power. This competitive wholesale market also should provide a significant level of insulation for retail ratepayers if Commonwealth Chesapeake's proposed facility turns out to be unnecessary or uneconomical. Consequently, based on the change in statute and the development of a competitive wholesale market on the Eastern Shore, the showing of need made by the Company and confirmed by the Staff adds weight toward a finding that the proposed facility is not contrary to the public interest.

For Commonwealth Chesapeake to become a part of the competitive wholesale market on the Eastern Shore, it must first complete an interconnection agreement with Delmarva and an

⁹⁴ *See, e.g.*, Lalor, Tr. at 295-96.

⁹⁵ Exhibit DRE-53, at 6; Staff Brief at 12.

⁹⁶ Daley, Tr. at 177-78.

⁹⁷ Lalor, Tr. at 224-25.

⁹⁸ *Id.* at 227-28.

⁹⁹ *Id.*

operating agreement with PJM. During the evidentiary hearing, Company witness Lalor outlined the contractual agreements that still must be resolved before Commonwealth Chesapeake can participate in PJM:

PJM has told us that we must go to Delmarva Power and get an interconnection agreement with them. We will also have several documents related to service in PJM. We expect that we will have an agreement with PJM that makes us, in effect, part of the pool

We will also have a study performed by PJM which is a reliability study to confirm that our power is, in fact, deliverable to the grid, and we will have an obligation either through direct contract with PJM or through part of an effective tariff that all participants in PJM are a party to, and which, as the quid pro quo, for their receiving and delivering our power, we have to respond to their dispatch signals.¹⁰⁰

Mr. Lalor further explained that Commonwealth Chesapeake will be the ground breakers in this area and that currently there is no precedent that defines exactly what contracts need to be in place.

In concluding that the showing of need made by the Company adds weight toward a finding that the proposed facility is not contrary to the public interest, it is assumed that the proposed facility will be interconnected with Delmarva and PJM. The availability of the power generated by the Company's proposed facility to satisfy demand on the Eastern Shore of Virginia is necessary to offset the negative environmental impact of the proposed facility. In other words, as in *Patowmack*, it would be contrary to the public interest to build a generating facility in an environmentally sensitive area and then attempt "to market the plant's capacity aggressively up and down the Eastern seaboard."¹⁰¹ Therefore, the Certificate issued to Commonwealth Chesapeake for the construction of its proposed facility should be contingent upon the Company entering interconnection agreements with Delmarva and PJM, or in the alternative, contracting to sell its capacity to ODEC. Furthermore, Commonwealth Chesapeake should have three years, or to the end of the sunset provision of the Certificate, to complete this requirement.

3. Viability of the Developer and Project.

In *Doswell*, the Commission established a requirement that IPPs demonstrate the technical and financial viability of both the developer and the project.¹⁰² On brief, Commonwealth Chesapeake acknowledges that this requirement remains "appropriate for the consideration of an

¹⁰⁰ *Id.* at 207.

¹⁰¹ 1995 S.C.C. Ann. Rep. at 270.

¹⁰² 1990 S.C.C. Ann. Rep. at 299.

application by an independent power producer pursuant to § 56-265.2 B.”¹⁰³ Indeed, a finding that an IPP lacked the technical expertise or the financial resources necessary to construct a generating facility, or a finding that a proposed generating facility was not technically or financially feasible likely would fail the public interest standard of § 56-265.2 B. Conversely, demonstration of the technical and financial viability of the developer and project adds weight to the other benefits considered regarding the public interest by increasing the probability of realization of these other benefits.

In this case, there appears to be no controversy regarding the technical and financial viability of the developer and the project. In essence, (i) Messrs. Lalor and Daley, and (ii) AES Corporation each own half of the proposed facility.¹⁰⁴ Messrs. Lalor and Daley successfully developed the independent power facility owned by Commonwealth Atlantic Limited Partnership (“CALP”), which was certificated by the Commission in 1990 and was placed in service in June 1992.¹⁰⁵ AES Corporation, as described earlier, owns or has an interest in eighty-two generating plants totaling 21,859 MW in twelve countries. As noted by Staff witness Ballsrud and later confirmed by Company witness Burdick, “AES Corporation has adequate resources and may elect to finance the entire Project with internal funds”¹⁰⁶ Consequently, the record supports a finding that the developer and the project are technically and financially viable.

4. Economic Development.

Section 56-46.1 permits the Commission to consider the impact of a proposed facility on economic development within the Commonwealth. The permissive language of the statute concerning economic development as compared to the mandatory language of the same statute regarding consideration of improvements in reliability indicates that economic development, or certain types of economic development, may not always be in the public interest. In this case, many of the public witnesses extensively debated the wisdom of economic development on the Eastern Shore of Virginia. In this regard, more weight should be given to the comments of local elected officials because they are more likely to represent the views of a majority of residents. These officials generally supported economic development for the Eastern Shore.¹⁰⁷ Accordingly, promotion of economic development on the Eastern Shore should be given a positive weight in determining whether the proposed facility is in the public interest.

The Company argues that the proposed project will facilitate development on the Eastern Shore by helping to ensure a high quality, reliable electric service. Further, Commonwealth Chesapeake testifies that the proposed facility will employ six to eight full-time employees and will increase the property tax base in Accomack County by approximately \$80 million.¹⁰⁸ According to Company witness Lalor, this increase in the County’s tax base will “equal or exceed

¹⁰³ Company Brief at 12.

¹⁰⁴ Exhibit JRB-52, at Chart 1.

¹⁰⁵ Exhibit CML-51, at 3-4; Exhibit RPL-23, at 2.

¹⁰⁶ Exhibit PWB-50, at 4; Exhibit JRB-52, at 6-7.

¹⁰⁷ *See, e.g.*, Manter, Tr. at 71-74; Hart, Tr. at 102-12.

¹⁰⁸ Daley, Tr. at 176; Exhibit RPL-24, at 27.

the combined tax base of the County's ten largest taxpayers.”¹⁰⁹ This increase in the County's tax base may have a positive impact on the local economy and infrastructure, and in turn, encourage further economic development. Thus, most of the individuals associated with local economic development testified in favor of the proposed facility.¹¹⁰

The Staff tends to support the Company's assessment of the impact of the proposed facility on economic development, stating that the proposed facility “may support economic development.”¹¹¹

Public witnesses that opposed the proposed facility perceived a negative impact on the local economy, generally claiming that increased pollution from the proposed facility could threaten the local poultry, seafood, and tourism industries.¹¹² Of these industries, only the poultry industry had a representative offer public comment, and he expressed support for the facility.¹¹³

Based on the above, I find that the record in this case supports a finding that the proposed facility will have a positive impact on economic development on the Eastern Shore. This finding, in turn, tends to support a finding that the proposed facility is not contrary to the public interest.

5. Improvements in Service Reliability.

Section 56-46.1 directs the Commission to consider “any improvements in service reliability that may result from the construction of [the proposed] facility.” In this case, Commonwealth Chesapeake claims that its proposed facility will greatly enhance the reliability of electric service to the Eastern Shore of Virginia. Commonwealth Chesapeake's proposed facility will include a clutch that will permit the facility to aid in voltage stability independent of operating the turbine.¹¹⁴ This permits the proposed facility to provide voltage stabilization without producing any emissions. In addition, generation from the Company's facility could provide power to the Eastern Shore of Virginia even if problems were to occur at substations, transmission lines, or generating plants in Delaware and Maryland.¹¹⁵

The Staff generally agrees with Commonwealth Chesapeake.

[T]he proposed generating facility would provide power to an area that currently does not host many power plants. Since the Eastern Shore appears to also have some transmission constraints, any

¹⁰⁹ Exhibit RPL-24, at 27.

¹¹⁰ *See, e.g.*, Holland, Tr. at 56-66; Manter, Tr. at 71-74.

¹¹¹ Exhibit DRE-53, at 11.

¹¹² *See, e.g.*, Trader, Tr. at 27-31; Bonney, Tr. at 74-77.

¹¹³ Dickinson, Tr. at 31-36.

¹¹⁴ Kelly, Tr. at 171-73.

¹¹⁵ Exhibit MWK-3, at 10.

generation located on the Peninsula could help reduce system losses and provide voltage support.¹¹⁶

Protestant Bailey disagrees. Mr. Bailey argues that the proposed plant is not needed to enhance the reliability of electric service to the Eastern Shore of Virginia.¹¹⁷ Mr. Bailey attempts to support his argument with quotes from Delmarva concerning projects Delmarva plans to undertake to upgrade or maintain system reliability on the Eastern Shore. However, Mr. Bailey begins this testimony with the following quote from the November 1996, Ten-year Planning Study of Delmarva Power:

The addition of major generation in the southern part of our system is critical to reduce north/south tie line flows, improve reactive voltage problems and increase our system import capability.¹¹⁸

Thus, even the testimony of Protestant Bailey tends to support a finding that the Company's proposed facility will enhance the reliability of electric service to the Eastern Shore of Virginia.

Consequently, the record in this case overwhelmingly supports a finding that the Company's proposed facility will significantly improve service reliability on the Eastern Shore of Virginia. This, in turn, adds weight to a finding that the proposed facility is not otherwise contrary to the public interest.

In summary, subject to the conditions described herein, I find that the Company's proposed facility is not otherwise contrary to the public interest. In weighing the various public interest factors, I find that enhancements in system reliability and the projected need for additional capacity in the PJM region, coupled with the emergence of a structured competitive wholesale power market within PJM, sufficiently offset the negative environmental impact of operating the proposed facility to meet the public interest standard of § 56-265.2 B. Accordingly, because I find that the Company has met the requirements of § 56-265.2 B, I recommend that the Commission grant a Certificate to Commonwealth Chesapeake for its proposed facility subject to the following conditions:

1. The proposed facility must be placed in service within three years from the issuance of this certificate;
2. Commonwealth Chesapeake must purchase the 100-acre buffer; and
3. Commonwealth Chesapeake must enter into interconnection and purchase power agreements with Delmarva and PJM as required to permit dispatch of the proposed facility by PJM, or in the alternative with ODEC, before placing the facility in service.

¹¹⁶ Exhibit DRE-53, at 9.

¹¹⁷ Bailey, Tr. at 280.

¹¹⁸ *Id.*

Waiver of Other Regulatory Requirements

In its original application, in addition to seeking a Certificate pursuant to § 56-265.2, Commonwealth Chesapeake requests: (i) approval under Virginia Code § 56-234.3 for the expenditures for the construction of the generating facility; (ii) exemption from Commission jurisdiction under Chapter 1, Article 5; Chapter 3; Chapter 4; and Chapter 10, Articles 1.1, 2, 2.1, 3 and 4 of Title 56 of the Virginia Code; (iii) clarification that any entity which lends money, credit, or services to the Company is not by virtue thereof a utility or public service company under Virginia law; and (iv) a declaration that the granting of a lien or security interest in the Company's assets does not require Commission approval. After the filing of the Company's application, the General Assembly enacted § 56-265.2 B. As described above, among other things, § 56-265.2 B authorizes the Commission to exempt facilities certificated pursuant to § 56-265.2 B from the provisions of Chapter 10. Thus, on brief, Commonwealth Chesapeake now seeks exemption from all of Chapter 10, including § 56-234.3, if applicable.¹¹⁹

The Commission has an established pattern of regulation for IPPs. In *Doswell* the Commission acknowledged that "[i]nefficient, wasteful construction practices, procedures, designs, planning, etc., may have an adverse effect on Virginia ratepayers regardless of who the nominal builder/owner may be."¹²⁰ While the Commission recognized that its duties under Chapters 3 and 4 of Title 56 are conditioned upon a co-extensive duty to regulate rates, it nonetheless ordered the IPP to file the following information:

- (a) The issuance of stocks and stock certificates or other evidences of interest or ownership, and bonds, notes, and other evidences of indebtedness and the creation of liens on any of the certificate holder's property within Virginia, as described in Virginia Code § 56-57, and amendments thereto, shall be accompanied by the filing of a statement setting forth the amount, character, terms, and purposes of stocks, stock certificates, or other evidences of interest or ownership, and bonds, notes, and other evidences of indebtedness issued or assumed;
- (b) Copies of all contracts or arrangements, and amendments thereto, described in Virginia Code § 56-77;
- (c) Three copies of any and all future contracts or arrangements, and amendments thereto, executed by and between Doswell and Virginia Power;

¹¹⁹ Company Brief at 8.

¹²⁰ 1990 S.C.C. Ann. Rep. at 298.

- (d) Any and all information, reports, etc., related to its operations as requested by the Commission's Divisions of Energy Regulation, Economic Research and Development, and Accounting and Finance;¹²¹

In this case, Commonwealth Chesapeake proposes to sell its power to an ISO that will dispatch power to public utilities serving the PJM region, including the Eastern Shore of Virginia. The development of this competitive wholesale market should provide the public with increased protection against an inefficient power producer. However, the development of a competitive wholesale market does not eliminate the Commission's regulatory duty or responsibility to the ratepayers of Virginia. That is, § 56-265.2 B permits the Commission to exempt Commonwealth Chesapeake from all of the ratemaking and regulatory requirements of Chapter 10, without otherwise limiting the Commission's general regulatory duty and powers. Therefore, I recommend that the Commission exempt the Company's facility from the provisions of Chapter 10 of Title 56 of the Virginia Code, including § 56-243.3. I further recommend that the Company be subject to reporting requirements similar to those established in *Doswell* and that it continue to be subject to all other applicable provisions of Title 56, including the Commission's general regulatory powers as provided in Chapter 1, Article 5.

FINDINGS AND RECOMMENDATIONS

In conclusion, based on the evidence received in this case, I find that:

- (1) Commonwealth Chesapeake's proposed facility is subject to the requirements of § 56-265.2 B of the Virginia Code;
- (2) The Company's proposed facility will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth;
- (3) The Company's proposed facility will have no material adverse effect upon the reliability of electric service provided by any regulated public utility in the Commonwealth;
- (4) The proposed facility is not otherwise contrary to the public interest;
- (5) Pursuant to § 56-265.2 B, the Commission should issue a certificate of public convenience and necessity for Commonwealth Chesapeake's proposed facility subject to the following conditions:
 - 1. The proposed facility must be placed in service within three years from the issuance of this certificate;
 - 2. Commonwealth Chesapeake must purchase the 100-acre buffer; and

¹²¹ *Id.* at 300.

3. Commonwealth Chesapeake must enter into interconnection and purchase power agreements with Delmarva and PJM as required to permit dispatch of the proposed facility by PJM, or in the alternative with ODEC, before placing the facility in service;

(6) The Company's proposed facility should be exempted from the provisions of Chapter 10 of Title 56 of the Virginia Code, including § 56-243.3;

(7) Commonwealth Chesapeake should be subject to reporting requirements similar to those established by the Commission in *Doswell*; and

(8) The Company will be subject to all other applicable provisions of Title 56, including the Commission's general regulatory powers as provided in Chapter 1, Article 5.

I therefore **RECOMMEND** that the Commission enter an order that:

(1) **ADOPTS** the findings in this Report;

(2) **GRANTS** the Company a certificate of public convenience and necessity for its proposed facility as conditioned above; and

(3) **DISMISSES** this case from the Commission's docket of active cases and passes the papers herein to the file for ended causes.

COMMENTS

The parties are advised that any comments (Rule 5:15(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P. O. Box 2118, Richmond, Virginia 23216. Any party filing such comments shall attach a certificate to the foot of such document that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

Alexander F. Skirpan, Jr.
Hearing Examiner